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# ***SENSIBLE SENTENCING FOR A SAFER CALIFORNIA***

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***LITTLE HOOVER COMMISSION***

**February 2014**

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# To Promote Economy and Efficiency

The Little Hoover Commission, formally known as the Milton Marks "Little Hoover" Commission on California State Government Organization and Economy, is an independent state oversight agency.

By statute, the Commission is a bipartisan board composed of five public members appointed by the governor, four public members appointed by the Legislature, two senators and two assemblymembers.

In creating the Commission in 1962, the Legislature declared its purpose:

*...to secure assistance for the Governor and itself in promoting economy, efficiency and improved services in the transaction of the public business in the various departments, agencies and instrumentalities of the executive branch of the state government, and in making the operation of all state departments, agencies and instrumentalities, and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives....*

The Commission fulfills this charge by listening to the public, consulting with the experts and conferring with the wise. In the course of its investigations, the Commission typically empanels advisory committees, conducts public hearings and visits government operations in action.

Its conclusions are submitted to the governor and the Legislature for their consideration. Recommendations often take the form of legislation, which the Commission supports through the legislative process.

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This report is available from the Commission's Web site.



*State of California*

# LITTLE HOOVER COMMISSION

February 27, 2014

The Honorable Edmund G. Brown Jr.  
Governor of California

The Honorable Darrell Steinberg  
President pro Tempore of the Senate  
and members of the Senate

The Honorable Robert Huff  
Senate Minority Leader

The Honorable John A. Pérez  
Speaker of the Assembly  
and members of the Assembly

The Honorable Connie Conway  
Assembly Minority Leader

Dear Governor and Members of the Legislature:

California's correctional system is a slow-motion disaster. Seven years ago, the Little Hoover Commission issued an unusually blistering report warning that time was running out for California policymakers to resolve the state's corrections crisis. In its study, *Solving California's Corrections Crisis: Time is Running Out*, the Commission urged then-Governor Arnold Schwarzenegger and the Legislature to immediately devise a comprehensive strategy and implement reforms, based on the decades of research, to avoid abdicating governance of California's correctional system to the federal courts.

Later in 2007, the federal courts found that prison overcrowding is the cause of unconstitutional levels of health and mental health care in California prisons and mandated the state reduce its prison population. For several years after, the state unsuccessfully tried to avoid the inevitable through legal maneuvers. In 2011, the state took its first serious step toward resolving the problem by implementing public safety realignment, a historic transfer of low-level offenders from state to local supervision. This move, however important, was not enough to stop the long-term trajectory of prison population growth.

On February 10, 2014, the courts gave California its final reprieve, extending the deadline to reduce prison overcrowding until February 2016. This time, however, the reprieve has teeth. If the state does not meet benchmarks for prison population reductions, it must release offenders early. In return, the state has agreed to stop appealing the court rulings and to implement changes that will provide a long-term solution.

Elected officials can no longer shift the blame onto the federal courts. The three-judge panel waived virtually all laws that might impede the state's ability to achieve the population reduction benchmarks. District attorneys who collectively have opposed even the slightest changes to sentencing laws are going to have to compromise. Judges, who refused to be held accountable in imposing sentences knowing many offenders serve very little time behind bars, must weigh in on system reforms. Sheriffs, part of California's "catch and release" criminal justice system, also must be willing to look beyond bars for solutions. California policymakers and their criminal justice partners must implement reforms to reduce the prison population that have been impossible in the past or be prepared to be held accountable. The prison population reduction cannot be achieved without eliminating the state's chronic imbalance between what its sentencing laws require and the resources available to incarcerate offenders.

Across the nation, there has been a significant attitude shift regarding incarceration. Taxpayers do not want to pay for failed policies that cycle offenders in and out of prison or incarcerate the mentally ill and the addicted for lengthy sentences without access to quality treatment. Research has shown programs and services that provide treatment can be effective in reducing crime.

Scientific research in the past 40 years has led to significant progress in many areas in California. When it comes to criminal justice sentencing, however, California has ignored the science. When policymakers enacted the Uniform Determinate Sentencing Act of 1976, at a time when many believed “nothing works” in reducing crime other than incapacitation, punishment replaced rehabilitation as the purpose of prison time. The law also was designed to create certainty and equality in sentencing. But nearly four decades later, more than a 1,000 laws and dozens of sentencing enhancements have led to a system that no longer makes sense. No longer is there truth or certainty in sentencing. At the same time, the system puts away offenders for increasingly longer periods of time, with no evidence that lengthy incarceration, for many, brings any additional public safety benefit.

California did not arrive at this moment in a vacuum. For most of the 20<sup>th</sup> century, rehabilitation was the purpose of incarceration. The current crisis provides a moment of opportunity, a time for California to think beyond court compliance. The Commission urges policymakers to amend the penal code to reflect that the purpose of incarceration cannot just be punishment, but also reduced recidivism and successful community reintegration. Rehabilitative programs and reducing crime are not mutually exclusive.

The Commission also urges policymakers to establish a Criminal Justice Information Center that would collect data on sentencing policies and best practices and provide recommendations on opportunities to improve sentencing and public safety. The information, data and guidance provided by this center could establish a path toward an independent sentencing commission, recommended twice before by this Commission and many others. A bill that creates a criminal justice policy institute is under consideration in the Legislature in 2014.

Realignment was a bold beginning. Implemented effectively with community-based programs and services, realignment holds the promise that many offenders will turn their lives around. In this review, the Commission saw opportunities to improve realignment, including requiring all offenders serving local jail time be supervised upon release and have access to appropriate programs and services. The Commission also urges the state to provide incentives to ensure that all counties use some of the billion dollars in realignment funding provided each year and require any new funding from the Recidivism Reduction Fund to pay for proven programs and services through public-private partnerships.

The Commission stands ready to assist you in solving California’s corrections crisis.

Most sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Shapiro". The signature is fluid and cursive, with the first name "Jonathan" written in a larger, more prominent script than the last name "Shapiro".

Jonathan Shapiro  
Chairman

***SENSIBLE SENTENCING FOR A SAFER CALIFORNIA***

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## ***Background***

**S**even years ago, the Little Hoover Commission warned policymakers to act decisively to address California's correctional crisis or risk ceding control of the system to the federal courts.

Foreseeing the political difficulty in tackling the problem, the Commission also recommended that if elected officials were unable or unwilling to advance reforms, they should turn the job over to an independent board of directors with the power and authority to enact reforms, modeled after the federal Base Realignment and Closure Commission (BRAC). The Commission recommended expanding community-based corrections for low-level, short-term offenders and establishing an independent sentencing commission to assess the state's sentencing laws.

Over the past seven years the corrections time bomb has kept ticking. Despite the Commission's sense of urgency in 2007, Governor Arnold Schwarzenegger and the Legislature allowed the problem to fester. Six months after the Commission issued its report, federal judges appointed a three-judge panel who subsequently found that prison overcrowding was the cause of unconstitutional deficits in health and mental health care. At the time, the agency was recording one avoidable inmate death a week due to insufficient health care. With no support or money to expand prison capacity, reducing the prison population became the only alternative. Eventually, the three-judge panel ruled that California had to reduce the population confined in its prisons to 137.5 percent of capacity. The case ultimately was heard by the U.S. Supreme Court, which in May 2011 upheld the panel's ruling.

### ***Public Safety Realignment***

As the three-judge panel ruling was winding its way through the courts, Governor Edmund G. Brown, Jr., and the Legislature historically enacted AB 109, public safety realignment, which shifted responsibility for thousands of low-level offenders and parolees to local authorities. This led to a reduction in the state prison population from an all-time high in 2007 of 173,000 offenders to 134,339 inmates at the end of 2013. Of the new total, approximately 118,700 are incarcerated in the state's 34 prisons.<sup>1</sup> The rest, for the most part, are in out-of-state contract

placements, in-state contract beds or fire camps. The courts have ordered the state to shed thousands more offenders to meet the population cap.<sup>2</sup>

Realignment has demonstrated that California is serious about addressing its prison overcrowding problem. But even with the historic population reductions, California in January 2013 signaled that it would not be able to achieve additional population reduction requirements set by the court, stating that “the population reductions currently required by the Court cannot be achieved by means that are consistent with sound prison policy or public safety.”<sup>3</sup> The state asked the federal court to terminate the population reduction requirement, arguing that it had made significant progress in reducing its prison population through realignment and that its prisons were providing an adequate level of health and mental health care. An April 2012 report issued by the California Department of Corrections and Rehabilitation (CDCR) had previously projected that “realignment alone will not be enough to bring the department into compliance with the Supreme Court order.”<sup>4</sup> The California prison population reduction effect from realignment bottomed out in February 2013, when total in-custody population dropped to 132,367.<sup>5</sup> By December 2013, the prison population had grown by nearly 2,000 offenders.<sup>6</sup>

### ***Recent Court Rulings on Overcrowding***

In April 2013, the court denied the state’s motion to vacate or modify the population reduction and ordered the state to immediately come up with a plan for compliance to achieve the population reduction by December 31, 2013.

Under threat of contempt, Governor Brown in May 2013 provided a plan to the court on how this additional reduction could be achieved. He proposed accelerated good time credits, which would result in some prisoners getting released sooner, contracting with counties for additional bed space, slowing the planned return of prisoners housed in out-of-state facilities and maximizing offender participation in fire camps. Additionally, the plan included gradually moving seriously ill and some mentally ill offenders to a new 1,800-bed prison health care facility in Stockton, which opened in July 2013.

In June 2013, the court ordered the state to implement the May 2013 plan. In July 2013, the state filed an appeal to the U.S. Supreme Court on the three-judge panel ruling that did not allow the state to vacate or modify the population reduction requirement. In August 2013, the Supreme Court dismissed the state’s request.



In September 2013, policymakers enacted SB 105, which authorized \$315 million in the 2014-15 budget and a total of \$1 billion in additional funding over three years for the state to lease additional prison cells, either county jail space or private correctional facilities both in and outside of California. The same law provided that the state may direct some of the money to programs through a newly established Recidivism Reduction Fund. The Governor's Budget released on January 9, 2014, recommended \$81 million of the budget be directed to the Recidivism Reduction Fund with \$40 million for community-based programs and services and the rest to fund various in-prison and parole programs.<sup>7</sup>

SB 105 also directed the administration "in consultation with stakeholders, including appropriate legislative committees, to assess the state prison system, including capacity needs, prison population levels, recidivism rates, and factors affecting crime levels, and to develop recommendations on balanced solutions that are cost effective and protect public safety."<sup>8</sup> The chair of the Board of State and Community Corrections has been tasked with leading this initiative.<sup>9</sup> An interim plan is due in April 2014, and a final plan is due in January 2015.

In the fall of 2013 the three-judge panel ordered the parties in the lawsuit to meet and confer to come up with a plan that would meet and sustain the population reduction requirement. As a result of these meetings, the court initially granted the state additional short-term reprieves to meet the reduction. Also in the fall of 2013, the Assembly convened a Select Committee on Justice Reinvestment, which held hearings to potentially develop legislative proposals to resolve the prison overcrowding crisis.

On January 13, 2014, the court ordered both sides in the lawsuit to file updated briefings indicating how and when prison overcrowding should be reduced. On January 24, 2014, the state requested an additional two years to meet the population reduction deadline. On February 10, 2014, the three-judge panel granted California the two-year reprieve and ordered the state to reduce the adult prison population to 137.5 percent of design capacity by February 28, 2016.

Unlike past reprieves, the February 2014 order requires the establishment of a compliance officer who has the authority to release offenders if the state does not meet the following interim benchmark targets:<sup>10</sup>

- 143 percent of design capacity by June 30, 2014
- 141.5 percent of design capacity by February 28, 2015

In granting the extension, the court order indicates the state has agreed to “develop comprehensive and sustainable prison population-reduction reforms and will consider the establishment of a commission to recommend reforms of state penal and sentencing laws.”<sup>11</sup> The state also agreed not to appeal the February 2014 court order. The order also directs the state not to increase the number of offenders housed in out-of-state facilities and encourages the state to explore ways to reduce its use of out-of-state facilities. In an opinion related to the court order, the three-judge panel labeled the out-of-state housing solution as neither “durable nor desirable.”<sup>12</sup>

The court, as part of the order, also has waived any laws that might impede the state’s ability to reduce the prison population:

*“To the extent that any state statutory, constitutional, or regulatory provisions, except the California Public Resources Code, impede the implementation of this order or defendants’ ability to achieve the population reduction benchmarks, all such laws and regulations are waived.”*<sup>13</sup>

Measures that Governor Brown proposed in the 2014-15 budget that are now required per the February 2014 court order include expanding the state’s existing Medical Parole Program, establishing a process for parole for offenders who are 60 or older and have served a minimum of 25 years of their sentence and increasing the eligibility of offenders with a second strike to earn good-time credits to 33.3 percent instead of the current limit of 20 percent.<sup>14</sup> The courts have ordered the state to establish a parole process for non-violent second strikers to become eligible for parole consideration once they have served 50 percent of their sentence.

This directive regarding offenders with a second strike is significant in that it makes a change to the Three Strikes Law enacted by voters regarding time served. It also is important because second strike offenders make up a significant and growing portion of the prison population. In its Fall 2013 Adult Population Projections report, the California Department of Corrections and Rehabilitation reported a spike in new admissions of offenders with a second strike in 2012-13, an increase of 32.6 percent over the previous fiscal year.<sup>15</sup>

Additionally, the court order expands good time credits for minimum custody inmates, includes a plan to establish 13 re-entry hubs and expands implementation of an existing alternative custody program for female offenders.<sup>16</sup>

## ***Other Prison Population Reduction Efforts***

During 2013, some of Governor Brown's proposed solutions to prison overcrowding were implemented. As of December 2013, approximately 1,200 offenders had been transferred to the new California Health Care Facility in Stockton, approximately 1,700 additional offenders were shifted to in-state contract beds and approximately 400 offenders were added to fire camps.<sup>17</sup> The state also anticipates that the DeWitt Nelson Correctional Annex, a former state juvenile facility in Stockton, will begin accepting adult offenders in 2014. Approximately 320 female offenders who qualified for the Alternative Custody Program established as a result of legislation enacted in 2010 have been placed in community-based housing for the last 24 months of their sentence. Another 500 women are potentially eligible for the program.<sup>18</sup> Approximately 8,900 offenders remain housed in out-of-state facilities. In January 2014, CDCR announced plans to build three new housing units at two existing prisons to provide 2,376 additional beds for offenders with disabilities and mental health needs.<sup>19</sup>

Over the past several years, the state has allocated \$1.7 billion to expand local correctional facilities. The state has awarded \$1.2 billion to 21 counties for an expected expansion of 9,000 jail beds. The Board of State and Community Corrections plans to award another \$500 million to 15 counties for additional local capacity in 2014. To qualify for this funding, counties are required "to build 'better' beds and treatment and programming space versus increasing capacity."<sup>20</sup> In the Governor's Budget 2014-15, Governor Brown has proposed an additional \$500 million for more expansion and improvements to local facilities for program space. Priority for this additional funding would be given to counties that use a risk and needs assessment tool to determine pre-trial release.

Enacted in 2009, SB 678 (Leno) also has led to a reduction in the prison population. This legislation provided an incentive to counties to reduce the number of adult felony probationers committed to state prison. It is estimated that this law prevented approximately 15,000 prison admissions in its first two years of implementation.<sup>21</sup>

Other recent changes also have reduced the prison population. As of August 2013, more than 1,300 offenders sentenced under the three strikes law and serving life terms for non-serious, non-violent offenses were released from prison as a result of Proposition 36, a 2012 ballot measure approved by voters that modified the state's three strikes law. Another 1,000 to 1,500 likely will be released as a result of Proposition 36.<sup>22</sup>

In 2013, lawmakers enacted and Governor Brown signed SB 260, which will result in an opportunity, beginning in 2014, for approximately 6,500 offenders convicted and sentenced to lengthy prison terms before they turned 18 to have their sentences reviewed by the Board of Parole hearings using different release criteria than for offenders convicted as adults. This also likely will lead to additional releases from prison as these offenders become eligible over time.

The Board of Parole Hearings, in 2012, granted parole to 670 offenders serving life terms, the highest number in one year ever.<sup>23</sup> Governor Brown allowed 377 of the parole grants to be implemented, a much higher percentage than his predecessors. The increase in parole of those serving term-to-life sentences who have served their time and have been deemed no longer a threat to society is a positive trend. But more can be done. Approximately 20 percent, some 25,000 offenders, are serving term-to-life sentences, for example, 15-years-to-life in prison.<sup>24</sup> Of these, approximately 10,000 “lifers” have passed their minimum term.<sup>25</sup> Nearly a third of the offenders serving life terms with the possibility of parole, more than 8,000 offenders, are 50 years old or older. Almost half of the offenders serving 25 years to life as a result of a third strike, nearly 4,200 offenders, also are older than 50.<sup>26</sup> Governor Brown, in his January 2014 budget proposal, indicated the Board of Parole Hearings plans to reduce the hearing timeline from 180 to 120 days, which will allow the board to consider more cases each year. According to data from the California Department of Corrections and Rehabilitation, less than 5 percent of lifers released from prison are returned to prison for a new crime, compared to 51 percent of the rest of the prison population released from prison.<sup>27</sup>

### ***Commission Study Process***

During the Commission’s bail and pre-trial services review, which culminated in a May 2013 letter to the Governor and Legislature, the Commission learned that bed capacity is frequently driving the amount of time convicted felons serve in local jails. With public safety realignment, more offenders who previously went to prison are serving time in local jails. Sheriffs and jail clerks, particularly in counties with jail population caps, often determine how much time an offender serves, despite what sentencing law dictates or what a judge has ordered. This issue existed before realignment, but has been exacerbated by the shift of offenders from state to local facilities.

In 2013 there were approximately 200,000 prison and jail cells available in California. “Judges can say whatever they want about putting people in those cells,” Matt Cate, former secretary of the California Department of Corrections and Rehabilitation, told the Commission in March 2013.

If those cells are not available, he added, “someone else is going to make some other decision. The Supreme Court has done it regarding prison cells. Sheriffs are doing it. Jail administrators are doing it.”

Concerns over these sentencing decisions prompted the Little Hoover Commission to convene two hearings in 2013 to further explore the need for sentencing reform in light of changes that have occurred as a result of realignment. A list of witnesses from these hearings, held in June 2013 in Sacramento and September 2013 in Los Angeles is included in Appendix A. This review builds on the Commission’s recent assessment of bail schedules and pre-trial services, which recommended the state expand oversight of public safety realignment and require every county to use validated tools to conduct risk and needs assessments of all offenders, and its prior reviews of sentencing policies in 2007 and 1994. All of these studies are available on the Commission’s website at [www.lhc.ca.gov](http://www.lhc.ca.gov).



## *Moment of Opportunity*

Despite significant efforts to reduce the state prison population, the long-term structural imbalance between what California’s sentencing laws require and its public safety resources remains. California’s prisons as of December 2013 remained at 145 percent of capacity, just one percentage point lower than December 2012. The California Department of Corrections and Rehabilitation, prior to the February 2014 court order, projected that the prison population would slowly continue to climb to approximately 136,600 by June of 2014 and more than 142,000 by 2019 barring any additional changes, moving the state away from the 137.5 percent of capacity required by the courts.<sup>28</sup>

The state cannot afford to continue to build its way out of the crisis. California Penal Code acknowledges this:

*“Criminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety.”<sup>29</sup>*

At the beginning of the state’s prison building boom in the early 1980s, adult and youth corrections accounted for 4 percent of California’s General Fund expenditures at \$1 billion per year.<sup>30</sup> Today, it represents 9 percent of the total General Fund, approximately \$9.5 billion.<sup>31</sup> This growth has come at the expense of other state priorities including higher education and social services.

With the exception of the recently completed California Health Care Facility and the planned infill housing previously described, California ended its prison-building boom with the opening of Kern Valley State Prison in 2005 after adding 21 new facilities between 1984 and 2005. The state previously had built 12 prisons over the course of 132 years. During the 20-year building campaign, California policymakers enacted hundreds of laws increasing sentence length, adding sentence enhancements and creating new sentencing laws. The end result was that every new prison the state built was quickly filled to capacity.

Voters played a role as well, enacting ballot initiatives, including the Three Strikes Law in 1994, which doubled the sentence length for second strikers and created a 25-year-to-life sentence for third strikers. Another voter-enacted initiative, the 10-20-Life “Use a Gun and You’re Done” Law

in 1997, added significant sentencing enhancements to certain serious felonies. In addition to being sentenced for the felony, an enhancement of 10 years of prison time is added if an offender commits certain crimes while in possession of a gun; 20 years prison time is added if the gun is fired, and 25 years to life is added if someone is killed or seriously injured. As a result of the gun enhancement law, a convicted murderer who used a gun to commit the crime could get as much or more time for the sentence enhancement than the actual murder charge. A second degree murder conviction might result in a 15-years-to-life sentence and the gun enhancement would add a 25-years-to-life sentence for a combined 40-years-to-life sentence.<sup>32</sup>

Unless lawmakers and the public they represent are willing to build more prisons and commit a greater percentage of the General Fund to corrections to pay for the ongoing expenses of running additional facilities, state prisons, under the current sentencing system likely will remain overcrowded. Without additional, long-term measures, prison overcrowding will continue to be a constant and costly battle for California.

### ***Second Strike Reform***

Under current law, defendants convicted with a second strike have their base sentence doubled. In addition, they must serve 80 percent of their sentence and must serve their term in state prison. Non-strikers qualify for good time credit that essentially can cut a prison term in half. Governor Brown in his January 2014 budget proposed changing that requirement to 66.7 percent of their sentence. The February 2014 court order requires implementation of that proposal and directs the state to develop a parole process for non-violent second strikers who have served 50 percent of their sentence.

Currently, 34,353 offenders in state prison, or 26 percent of the total, are second strikers. Of these, 8,851 were convicted of property offenses and 5,257 were convicted of drug offenses. Under current law, an offender with a prior burglary conviction who then is convicted of a drug offense could wind up serving a longer prison term than a person convicted on a first offense of a serious, violent crime against a person. California prisons hold 7,932 offenders convicted with a third strike who are sentenced to a minimum of 25 years to life in prison. Of these, 3,886 or nearly 50 percent are older than age 50. Some suggested opportunities for additional reform include:

- Remove burglary from the list of serious and violent crimes.
- Realign offenders whose prior strike is a burglary from state to local supervision.

Sources: California Department of Corrections and Rehabilitation. June 30, 2013. "Second and Third Striker Felons in the Adult Institution Population." Also, California Department of Corrections & Rehabilitation. August 2013. "Number of Female and Male Offenders by Age, Ethnicity and Offense Category." Also, see endnote 10. Also, Glenn Backes, Public Policy Research and Consulting. Representing Drug Policy Alliance. April 25, 2013. Letter to June Clark, Office of Governor Jerry Brown re: Prison Population Reduction. On file.



## ***Realignment Falls Short***

Realignment is the most significant correctional policy change in the nation, but it did not address the structure of sentences, it simply changed the place where the sentence is served. “It doesn’t change one day of time, just where and how people serve their sentences,” retired Placer County Superior Court Judge Richard Couzens told Commission staff.<sup>33</sup> Robert Weisberg, Stanford law professor and co-director of the Stanford Criminal Justice Center, concurred: “The total sum of incarceration hasn’t changed very much; realignment has helped solve overcrowding in the prisons,”<sup>34</sup> but it did not directly address sentence length. Judge Couzens, one of the state’s leading experts on sentencing, said that California still faces sentencing challenges, including widespread disparities by county, despite the use of sentencing grids that limit court discretion. California’s leaders still face risks, and costs, for failing to address these problems, despite the state’s progress, he said.

However significant, realignment on its own is not enough to undo nearly four decades of sentencing law expansion. Until the state resolves the structural mismatch between sentencing laws and correctional resources, the state will remain in perpetual crisis.

## ***Changing the Purpose of Incarceration***

California has arrived at what one witness described as a “moment of opportunity” for comprehensive sentencing reform.<sup>35</sup> Much has been learned in corrections in the past 40 years. Evidence has undercut the premise that punishment is the only thing that can be done with offenders.<sup>36</sup> Retribution, although a common goal of penal systems in the United States, is just one sentencing goal in many foreign countries, particularly European countries that also consider incapacitation, deterrence, restoration and rehabilitation as sentencing goals. Peggy McGarry, director of the Center on Sentencing and Corrections, Vera Institute of Justice, testified to the Commission that California and other states in the U.S. seem to be stuck in a punishment-based system popular in the 1970s. Despite nearly four decades of research on policies that reduce crime, many states are unwilling to relinquish punishment as the top priority, even though this philosophy has resulted in a drain of resources from education and health care to fund incarceration. “If we now know that we can influence and impact behavioral outcomes for most offenders with appropriate assessments and targeted interventions, why would we continue to create or maintain sentencing policies that are based on a ‘punishment only’ model and spend huge amounts of money on sending so many people to prison and keeping them there for long periods of time?” Ms. McGarry testified.

***“The conversation must change from ‘how much can we punish’ to ‘what are we doing that promotes public safety and fewer victims.’”***

Peggy McGarry, director of the Center on Sentencing and Corrections, Vera Institute of Justice

According to witnesses who testified at the Commission's June 2013 public hearing, California now faces conditions not unlike it did in the 1970s under indeterminate sentencing. The Adult Authority that made decisions regarding parole release was charged with simultaneously being excessively harsh and discriminatory with some offenders and too lenient with others. Lawsuits claimed race and gender discrimination. Victims' rights advocates argued that dangerous offenders were being paroled too early. In response, California passed the Uniform Determinate Sentencing Act, initially providing certainty and equality in sentencing. In addition to providing equity and certainty, the law also changed the purpose of incarceration, which for sixty years had been "to put before the prisoner great incentive to well-doing...the purpose is to strengthen his will to do right and lessen his temptation to do wrong."<sup>37</sup> At a time when many believed "nothing works" in reducing crime other than incapacitation, punishment replaced rehabilitation as the function of prison time. As a result, the California Penal Code was amended to read, "the Legislature finds and declares that the purpose of imprisonment for crime is punishment."<sup>38</sup>

Over the next three decades, the determinate sentencing structure has been radically re-written – law by law – with no evaluation of the laws for their effect on public safety. Today, there are more than 1,000 felony sentencing laws and more than 100 felony sentence enhancements across 21 separate sections of California law.<sup>39</sup>

In recent years, California effectively has returned to a dysfunctional system of indeterminate sentencing. The federal court, in ordering the reduction in the prison population and the counties, implementing 58

### ***Beyond Punishment: Penal Code Provisions to Improve Public Safety***

California's Penal Code Section 1170(a)(1) states that the purpose of imprisonment is punishment. The Legislature expresses repeatedly, however, through other sections of the Penal Code, that improving public safety depends on measures beyond punishment. The next section of the Penal Code, Section 1170(a)(2) exhorts the state to develop policies and programs to "educate and rehabilitate" nonviolent felony offenders. Later, declaring that "there is a correlation between prisoners who are functionally literate and those who successfully reintegrate into society upon release" the Legislature, in Section 2053, mandates that the Department of Corrections and Rehabilitation offer programming to bring prisoners to at least a ninth-grade reading level, and for those reading at a ninth-grade level or higher, assistance in obtaining a high school diploma or general equivalency degree and further mandates access to college classes and career technical education. The Preliminary Provisions of the Penal Code state, in Sections 17.5(a)(3),(4) and (8), that prisons alone are not enough to improve public safety and that California must use its criminal justice resources to support community-based corrections programs and evidenced based-practices. These include community supervision, restorative justice, education, work release, substance abuse, mother-infant care and multi-faceted residential programs, among others. The law is clear: punishing criminals is not sufficient. Improving public safety includes education and rehabilitation.

different versions of realignment, are administering justice in California. Echoing the concerns of the '70s, a victims' rights advocate told the Commission that good-time credits and early release have weakened sentences and no longer is there truth or certainty in sentencing.<sup>40</sup>

Advocates for sentencing reform told the Commission that laws and enhancements have created a system that puts away offenders for increasingly longer periods of time at great cost to the public, without any evidence that lengthy incarceration, for many offenders, brings any additional benefit. The executive director of Californians for Safety and Justice testified to the Commission that data show little is gained from multiple years of incarceration, particularly when there are no programs to address the underlying criminogenic tendencies. It can be counter-productive and can in fact lead to more crime when offenders are eventually released.<sup>41</sup> The Pew Center on the States also has done research on the high cost and low return of longer prison terms.<sup>42</sup>

Now that the majority of low-level offenders are not going to prison, the offenders who are sentenced to prison have committed more serious and violent crimes and will serve longer sentences. The average sentence and credits for offenders in prison in 2012 was 57.3 months, up from 45.8 months in 2010, prior to realignment.<sup>43</sup> The average sentence and credits for offenders in prison in 1992-93 was 23.6 months.<sup>44</sup> Prior to realignment, offenders sentenced under the Determinate Sentencing Act made up the majority of offenders, roughly 58 percent, compared to 45 percent post-realignment. Offenders with a strike or those serving life with the possibility of parole now make up the majority of the population, 32 percent and 19.5 percent respectively. Death row inmates and those sentenced to life without the possibility of parole represent the smallest portion of the prison population, just 4 percent.<sup>45</sup>

## ***Sentencing Based on Science***

California can continue to chip around the edges and let the federal courts govern the state's correctional system, or take the lead. California first must define new goals for criminal justice sentencing and incarceration beyond punishment, including improving public safety by implementing programs and services proven effective in promoting successful reintegration of offenders into communities and reducing recidivism.

The state also should assess whether the current labyrinth of sentencing laws achieves its public safety goals and, if not, develop a sentencing system based on the evidence of what works and move away from the failed strategies of the past that have led to prison overcrowding and the highest recidivism rates in the nation.

Extensive research has been done on “what works.” The Washington State Institute for Public Policy, a non-partisan research organization, for more than two decades has analyzed evidence-based programs that reduce crime and save money. In a November 2013 report updating its earlier work, the institute found alternative sentencing for drug offenders as well as in-prison treatment, educational and vocational programs, community-based employment and job training programs to have high benefit-cost ratios and a high likelihood of successful outcomes.<sup>46</sup>

In California, a study of in-prison drug treatment programs with aftercare for offenders upon release into the community found a significant reduction in recidivism – a one-year return-to-custody rate of 8 percent compared to a 50 percent return rate for a control group and a 42 percent return-to-custody rate after five years compared to 80 percent return-to-custody rate for a control group.<sup>47</sup>

Ideally, California should establish an independent sentencing commission as recommended by this Commission in 1994 and 2007, and by many others. An independent sentencing commission would have the authority to develop sentencing guidelines that would become law unless rejected by a majority vote of the Legislature, thereby removing the politics from the policy that so broadly affects California. It would be a clearinghouse for all sentencing and offender data and would assess all proposed sentencing law changes for their potential effects on criminal justice policies and correctional system resources.

### ***Evidence-Based Options to Reduce Crime***

The Washington State Institute for Public Policy, established by the Washington State Legislature in 1983, conducts non-partisan research and has done significant benefit-cost analysis on criminal justice programs and policies. The institute’s research approach includes three steps: an analysis of “what works” and what does not work to improve outcomes, using a statistical technique called meta-analysis; a calculation of whether the program’s benefits exceed its costs; and, the risks of investing in a program value. In a November 2013 report, the institute found several types of programs have both a high benefit to cost ratio and a 99 percent chance or higher for providing a positive net value. These programs include:

- Alternative sentencing for drug offenders
- Educational programs in prison
- Inpatient/intensive drug treatment during incarceration
- Outpatient/non-intensive drug treatment during incarceration
- Cognitive behavioral treatment for high and moderate risk offenders
- Employment training/job assistance in the community

As far as programs that provided a negative net value, the institute found intensive supervision with only surveillance and case management in the community without swift and certain sanctions to cost more than the benefits provided.

Source: Steve Aos and Elizabeth Drake. Washington Institute for Public Policy. November 2013. “Prison, Police and Programs: Evidence-Based Options that Reduce Crime and Save Money.”

### ***Sentencing Reform Efforts***

After the Commission's 2007 report was released, the Legislature introduced two sentencing reform bills in 2007 that proposed establishing a sentencing commission. The bills failed due to political disputes unrelated to the legislation. Another attempt was made in 2009 when a sentencing commission was included in part of a corrections budget reduction package, but was pulled prior to a final vote.

Little progress in California sentencing reform at the legislative level has been made since, though the Legislature and Governor Schwarzenegger enacted a change to the law governing simple marijuana possession, imposing a fine instead of requiring a fine and a court appearance.

In 2009, the Legislature on a vote split primarily along party lines, enacted SB 18XXX (Ducheny), which increased the threshold for determining whether theft and various other property crimes are a misdemeanor or a felony from \$400 to \$950. This effectively reduced the severity of various property crimes. A ballot measure, created by San Diego Chief of Police William Lansdowne and San Francisco District Attorney George Gascón, introduced in 2014 would similarly increase the dollar threshold for several other low-level crimes and reduce several low-level drug offenses to misdemeanors.

It is notable that SB 18XXX and AB 109, the realignment legislation, were both enacted as budget trailer bills. Neither was heard by policy committees although both affected public safety policies. AB 109 mushroomed from a one-page placeholder bill introduced on January 10, 2011, into a 663-page revision of nearly 600 sections of statutory code on March 14, 2011. On March 16, 2011, AB 109 was passed by the Senate Budget & Fiscal Review Committee with an 11-5 vote along party lines. On March 17, 2011, AB 109 was enacted 24-16 in the Senate and 51-27 in the Assembly. The bill analyses reflected neither support nor opposition. On April 4, 2011, just three weeks after the bill was amended, Governor Brown signed AB 109 into law.

Since 2007, there essentially has been a moratorium on enacting any new legislation that might lead to longer sentences. In 2007, Senator Gloria Romero, as chair of the Senate Public Safety Committee, implemented the Receivership/Overcrowding Crisis Aggravation (ROCA) policy, which prevented any legislation that might increase prison sentences from passing out of the policy committee. Although Senator Romero termed out of office, each of her successors as chair of the Senate Public Safety Committee has kept the ROCA policy in place.

One significant exception was the enactment of Chelsea's Law (AB 1844 Fletcher), named in honor of a young woman who disappeared while on a run in a community park and was raped and murdered by a convicted sex offender. The law, unanimously approved by legislative policy committees and both houses of the Legislature, was signed by Governor Arnold Schwarzenegger in September 2010. The law, among other things, lengthens prison sentences for various sex offenses.

In 2013, the Legislature enacted SB 649 (Leno), legislation that would have given prosecutors the flexibility to charge possession of cocaine, crack cocaine and heroin as either a misdemeanor or a felony, aligning with existing flexibility for possession of methamphetamine and certain other drugs. The California District Attorneys Association opposed the bill even though it would have created greater discretion in filing charges. Governor Brown vetoed the bill, stating, "We are going to examine in detail California's criminal justice system, including the current sentencing structure. We will do so with the full participation of all necessary parties, including law enforcement, local government, courts and treatment providers. That will be the appropriate time to evaluate our existing drug laws."

Also in 2013, legislation was proposed to create an Advisory Commission on Public Safety to review sentencing laws and make recommendations for reform and to provide more resources for community-based treatment and services. This was a counter to SB 105, Governor Brown's proposal to spend an additional \$1 billion to contract for additional prison bed space. In a compromise, SB 105 was amended to provide additional resources that conditionally would be diverted from the \$1 billion for contract beds to community services if the courts grant the state additional time to achieve the population reduction. The advisory commission was not included in the compromise. In February 2014, the courts granted the state additional time to achieve the population reduction.

San Francisco has taken a lead by establishing a 13-member sentencing commission “to encourage the development of criminal sentencing strategies that reduce recidivism, prioritize public safety and victim protection, emphasize fairness, employ evidence-based practices and efficiently utilize San Francisco’s criminal justice resources.”<sup>48</sup> The commission serves as an advisory body for the district attorney, the mayor and the Board of Supervisors. The San Francisco Sentencing Commission provides a model from which the state can learn.

Much of the crucial data needed to inform responsible policymaking is not being collected. Though it was one of the nation’s largest and most significant criminal justice policy shifts, the realignment legislation did not require standardized statewide data reporting. Instead, the Board of State and Community Corrections and the Chief Probation Officers of California collect county data submitted on a voluntary basis. The board also is working with the Public Policy Institute of California on a review of

### ***Crime Rates and Realignment – What We Know and What We Don’t Know***

Violent and property crime increased slightly in California in 2012, corresponding with a nationwide increase in crime, but without the appropriate data, it is difficult for policymakers to know if realignment or other factors were responsible for the increase. Yet crime rates in many counties are down. Despite the significant number of offenders realigned from state supervision to Los Angeles County supervision, crime in Los Angeles County in 2012, the first full calendar year of realignment implementation, remained at an all-time low, the second lowest in 42 years. Los Angeles also experienced the lowest number of homicides in 2012 since 1970, decreasing by 2.58 percent compared to 2011. In Richmond, a city in Contra Costa County that in 2008 was ranked one of the nation’s 10 most dangerous cities, crime also continued a decade-long decline with total reported crimes more than 40 percent lower in 2013 than in 2003.

The Public Policy Institute of California reported in a December 2013 study on realignment and crime rates that a slight increase in violent crime in California between 2011 and 2012 was consistent with trends from other states and likely was not related to realignment. In contrast, the study found evidence that realignment is related to increased property crime, specifically a significant increase in auto theft. The study concluded that even with the increase in auto theft, alternatives to incarceration, such as increased policing, provided a more cost-effective approach to crime prevention. The Center on Juvenile and Criminal Justice (CJCJ), using different assumptions, did not find a causal link between realignment and motor vehicle theft in its study of violent and property crime for the year 2012. Working off the assumption that, if realignment causes crime, then the places with the highest proportions of realigned individuals would experience the largest increases in crime, CJCJ actually found the difference in motor vehicle thefts trends was small between high and low realignment counties. In addition to its research on crime rates, the Public Policy Institute of California in August 2013 entered into a memorandum of understanding with the Board of State and Community Corrections to collect and analyze realignment data in 10 counties; that effort is expected to be completed by the end of 2014.

Sources: California Department of Justice. “Crime in California: 2012.” <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd12/cd12.pdf?> Accessed August 26, 2013. Also, 2012 Los Angeles County Annual Report. <http://www.lacountyannualreport.com/2012/printreports.html>. Accessed September 5, 2013. Also, Richmond Police Department. Also, Robert Rogers. January 6, 2013. “Richmond Reports Lowest Homicide Total in 33 Years, Credits Multipronged Efforts.” *Contra Costa Times*. Also, Public Policy Institute of California. December 2013. “Public Safety and Crime Rates in California.” Also, Mike Males and Brian Goldstein. January 2014. “California’s 58 Crime Rates: Realignment and Crime in 2012.” San Francisco, CA. Center on Juvenile Crime and Criminal Justice. [http://www.cjcj.org/uploads/cjcj/documents/CJCJ\\_2014\\_Realignment\\_Report.pdf](http://www.cjcj.org/uploads/cjcj/documents/CJCJ_2014_Realignment_Report.pdf). Accessed February 4, 2014.

10 counties, with a report anticipated near the end of 2014.

In January 2014, the California State Senate enacted SB 466 (DeSaulnier) with a vote of 28-6 that would establish the California Institute for Criminal Justice Policy as an independent data-driven institution that would “promulgate best practices in criminal justice and guide the state in a transition from a problem-plagued justice system to evidence-based practices.”<sup>49</sup> The institute would conduct cost-benefit analysis on pending legislative measures related to criminal justice policy for the Legislature and develop a statewide plan for public safety and strategies based on data and science that reduce recidivism and hold offenders accountable. The legislation requests that the University of California house the institute. As proposed, the institute would be funded in its first year by private money, and in later years be funded through the annual Budget Act and would sunset on January 1, 2018. As of February 2014, the bill was under Assembly consideration.

## **Summary**

The federal court has granted California policymakers what they asked for – two more years to implement long-term, durable solutions to correct prison overcrowding. California should seize the moment and set new goals for incarceration and instill new measurements for success. Ideally, the state should establish an independent sentencing commission and use science and evidence to guide sentencing decisions. Given the numerous futile attempts to establish a sentencing commission in California over the past three decades, the Commission urges policymakers instead to establish a Criminal Justice Information Center that would collect and analyze data, review California’s sentencing structure and make recommendations for reforms to the Governor and the Legislature. Such a center could create a path to a sentencing commission.

***Recommendation 1: The Governor and the Legislature should amend Penal Code Section 1170 to state that the purpose of imprisonment for crime is punishment as well as successful offender reintegration and reduced recidivism.***

***Recommendation 2: The state should establish a Criminal Justice Information Center to collect data on sentencing policies and best practices and provide recommendations on opportunities to balance the state and local correctional resources with the state’s sentencing structure while maintaining or improving public safety.***

- ☐ ***The data and guidance provided by the center could create a path toward establishing an independent sentencing commission.***
- ☐ ***The center should be housed in a university or non-partisan, nonprofit organization.***





## ***Sentencing: Local Effects***

In addition to revisiting prior work on sentencing, the Commission as part of this review, also examined how changes resulting from realignment have affected sentencing and supervision at the local level. As stated previously, the public safety realignment legislation did not change the structure of sentences, it simply changed where and how people serve their sentences. With public safety realignment, more offenders who previously went to prison are serving time in local jails. Many counties have jail overcrowding and court-imposed jail population caps. As a result, sheriffs and jail clerks often determine how much time an offender serves, despite what sentencing law dictates or what a judge has ordered.

The realignment legislation included two new sentencing options, split sentencing and flash incarceration. Split sentencing provides an opportunity for judges to sentence an offender to county jail for part of the sentence and to mandatory supervision following the jail term. Flash incarceration gives probation officers the authority to immediately incarcerate an offender who violates the terms of post-release community supervision for up to 10 days. The idea, based on a successful program in use in Hawaii, is to modify behavior through swift and certain sanctions.

Many of the problems identified as overarching sentencing issues in this and prior Commission reviews have been exacerbated by realignment, particularly sentencing disparities among counties, specifically in terms of the use of split sentencing and the availability of community-based alternatives to incarceration.

### ***Sentencing Disparities***

In its 2007 study, the Commission found that sentences for similar crimes can vary significantly by county and by courtroom in California. In this review, the Commission found the use of split sentencing varies widely. In Los Angeles County, approximately 6 percent of offenders sentenced after realignment have been given a split sentence. In Contra Costa County, 89 percent of offenders have split sentences.<sup>50</sup> Los Angeles County judges told Commissioners that they prefer, when appropriate, to sentence an offender to probation and retain the threat of

possible jail time as a tool to encourage an offender to comply with the terms of probation.<sup>51</sup> The lack of appropriate community-based programs also can be a driver in the huge variance in the use of the split sentence. Additionally, the vast majority of sentences are settled through the plea bargaining process. Defendants who already have served much of their sentence before the plea agreement may not want the additional supervision required by a split sentence.

Witnesses at the Commission's public hearings decried not only the

### ***Contra Costa as a Model for California***

In a climate in which county jails – many overcrowded before realignment – are filled to capacity and sheriffs under court-ordered population caps must decide which inmates to release, Contra Costa County provides a model of successful correctional resource management.

Contra Costa has a correctional population – including offenders incarcerated in state prisons and local jails and offenders on parole and felony probation – at a rate that is half the statewide average in California. The ninth largest county in the state, Contra Costa County includes Richmond, a city long-troubled by crime, as well as several other cities in the northern part of San Francisco's East Bay. Its crime and arrest rates are similar to statewide averages. A January 2014 review of correctional management practices in Contra Costa identified several key factors:

- Contra Costa County, even before realignment, sent only 13 percent of felony offenders to prison, compared to a statewide average of 20 percent.
- It has the state's highest rate of split sentences, a rate of 89 percent, compared to a statewide average of 28 percent.
- Probation terms in Contra Costa are shorter than in other counties, typically 24-36 months instead of five years.
- Its three-year recidivism rate for felony probationers was 20 percent, compared to a statewide average of 60 percent or higher.

Researchers from the JFA Institute who conducted the study determined that a historically strong collaboration among criminal justice agencies was key to the success. When realignment was first implemented, there was consensus that maximizing split sentencing would better serve the offender population, as it allows additional correctional measures, often more rehabilitative than jail time alone, and permits the continued supervision and support for the offender as he or she reintegrates into the community. The researchers found that in Contra Costa County, the district attorney supports split sentencing because it allows for supervision under probation; the public defender supports it because it reduces the time offenders are incarcerated; the sheriff supports it because it reduces the potential for jail crowding and courts view it as a cost-effective correctional measure proportional to the crime. Additionally, Contra Costa County allocates approximately 60 percent of its realignment funds to programs and services, including probation, the public defender's office, health services and contracted programs.

The JFA Institute concluded that other jurisdictions can potentially manage their criminal justice resources better by coordinating their activities and making sentencing decisions that are proportional to the crimes committed. It also found that probation can produce better results by relying on shorter, more effective terms of supervision and targeted treatment services, many of which are already available from existing agencies and organizations.

Source: James Austin, Robin Allen and Roger Ocker. January 2014. "Contra Costa County: A Model for Managing Local Corrections." JFA Institute. [http://libcloud.s3.amazonaws.com/211/7e/c/319/JFA\\_ContraCosta\\_report.pdf](http://libcloud.s3.amazonaws.com/211/7e/c/319/JFA_ContraCosta_report.pdf). Accessed February 6, 2014. Also, James Austin. "Viewpoints: One County's Success Story with Realignment. January 19, 2014. [Sacramento Bee](#).

disparities in using split sentencing, but the challenges posed when an offender serves straight jail time and has no post release supervision. These offenders who formerly would have been sent to prison and released to three years of state parole supervision are now sent back into the community with no supervision and, in many cases, no access to programs and services that would promote successful reintegration. A recent survey of 112 California judges conducted by the Stanford Criminal Justice Center revealed the majority of judges prefer “jail with a tail,” a combination of jail time and rigorous community supervision. The report summarizing the survey recommended that counties enhance and increase the availability of effective community-based treatment resources, as improved programs likely would increase judges’ confidence in embracing split sentencing.<sup>52</sup>

Governor Brown, in his January 2014 budget, proposed legislation that would require all felony sentences resulting in county jail time to be split sentences “unless the court finds it to be in the interests of justice based on facts in the particular case to impose a straight sentence.”<sup>53</sup> Mandatory supervision would provide an opportunity for these offenders to participate in re-entry programs that provide treatment, education and vocational skills that will help prevent a return to jail or prison.

In this review and its prior review of bail and pre-trial services, the Commission found great variances in the availability of community-based programs and services. The basis for realignment was that counties would be positioned to best serve the low-level offenders in the community, both through the criminal justice system and in providing services to help them succeed. A certain amount of latitude would be necessary for counties to be able to tailor spending and programs to their communities’ needs, but the state did not provide any statewide standards for using the nearly \$1 billion it provides annually to the counties and does not evaluate how those funds are spent. Instead, the state requires that each county create a spending plan that is developed by a Community Corrections Partnership that is chaired by the chief probation officer. Other members include the district attorney, public defender, presiding judge of the superior court, a chief of police, sheriff, and a representative from social services. The Community Corrections Partnership submits its plan to the county Board of Supervisors, which can only overturn the plan with a four-fifths vote.<sup>54</sup> Consequently, an individual’s experience with the criminal justice system and their chances of successfully reintegrating into the community afterward and not recidivating vary dramatically by county.

In addition to the sentencing disparities, realignment has resulted in many offenders serving prison-length sentences in jails not equipped for long-term populations. Before realignment, the maximum stay in a

county jail was one year. Under realignment, convictions that will now be served in county jails can be as high as 20 years for a single charge, before adding time for aggravating factors or enhancements.<sup>55</sup> According to a California State Sheriffs Association survey, 1,153 offenders had been sentenced to five or more years of jail time as of February 2013.<sup>56</sup> The most common crime resulting in a local long-term sentence is drug trafficking. Governor Brown, in his 2014 budget, proposed housing offenders serving 10 years or more in state prison, if and when the state achieves the court-ordered population cap. The Legislative Analyst has cautioned that such a change could create a fiscal incentive for counties to seek longer sentences.<sup>57</sup> Policymakers also should consider whether these lengthy sentences and sentencing enhancements are appropriate for non-serious, non-violent, non-sex crimes.

### ***Reforming Drug Laws***

Governor Brown, in his veto message for SB 649 (Leno), a law which would have given prosecutors discretion in whether to charge possession of cocaine, crack or heroin as a misdemeanor or a felony, indicated the administration had plans to examine the current sentencing structure and such a review would be an appropriate time to evaluate existing drug laws. Like the rest of the nation, California enacted numerous laws in the 1980s and 1990s in an attempt to tackle illicit drug use and the many crimes related to addiction and illegal drug sales. Other states and the federal government have begun efforts to dial back some of the harsher sentences associated with drugs.

Efforts are already underway at the federal level to reduce the number of years spent in prison for low-level drug crimes. Federal sentencing law already includes a “safety valve” that allows judges to disregard mandatory minimum terms when a defendant is a low-level, non-violent offender and has cooperated with the investigation. The U.S. Attorney General in 2013 announced that low-level, non-violent, non-gang offenders will no longer be subject to mandatory minimums but will be charged with offenses commensurate with their crimes. The Smarter Sentencing Act, introduced in the U.S. Senate, if passed, will considerably reduce mandatory minimums for drug crimes.

Currently, California’s drug sentencing is on par with federal sentencing, though California judges lack the safety valve that would give them greater discretion in sentencing lower-level offenders. If the Smarter Sentencing Act is passed, California’s drug laws will be much harsher than those at the federal level.

In testimony to the Commission, Lynne Lyman, California state director of the Drug Policy Alliance, provided recommendations on specific areas of laws, that if amended, could substantially address the overcrowding crisis. Her recommendations include:

- Establishing parity for crack cocaine sentencing, which would equalize the penalty for possession of cocaine base (crack) for sale to the penalty of possessing cocaine in powder form for sale.
- Reducing the penalty for possession of controlled substances for personal use to a misdemeanor.
- Reforming significant sentencing enhancements for prior drug sales or possession-for-sale convictions by lowering enhancements from three years to one year and only applying the sentencing enhancements after two or more convictions.
- Rewording the language for enhancements for volume and weight of drugs involved so that the enhancements apply to those involved in the planning, direction, or financing of the underlying offense, rather than to low-level drug trade workers.
- Allowing all non-violent drug possession offenders to qualify for drug treatment diversion; realigning all non-violent drug felony offenders unless they have two prior strikes; exempting all non-violent drug felonies from Three Strikes and reducing prior conviction enhancements for non-violent drug offenses.

Source: Lynne Lyman, California State Director, Drug Policy Alliance. September 26, 2013. Written testimony to the Commission.

## ***Using Data to Guide Local Sanctions***

A key premise of the realignment legislation was that local sanctions would include a continuum of options including electronic monitoring, treatment programs for substance use disorders and mental illness as well as jail incarceration. But the state does not require counties to report how they spend the nearly \$1 billion provided annually for supervision as well as programs and services for realigned offenders. As a result, it is hard to compare the availability of programs and services across California, much less whether or not available programs are effective.

Local Community Corrections Partnerships, which decide how the realignment funding is spent in each county, generally emphasize law enforcement in their allocation decisions.<sup>58</sup> At the Commission's September 2013 hearing in Los Angeles, witnesses representing the provider community expressed concerns that even when funds are designated for treatment and re-entry services, they still are not reaching the service providers.

The California Association of Alcohol and Drug Program Executives sent a letter to the Director of the Substance Abuse Prevention and Control (SAPC) division of the Los Angeles Department of Public Health outlining year-long delays in awarding substance abuse treatment contracts.<sup>59</sup> Commission staff spoke with the SAPC director in September 2013, nearly two years after public safety realignment implementation began. He explained that the delays were due to a competitive bid process that includes scoring, notifying and creating a list of pre-qualified providers.<sup>60</sup> Witnesses expressed concerns that it is not clear how the funding for treatment was spent in the interim. Further complicating the issue is the fact that at least part of the Los Angeles County Board of Supervisors acknowledged being unaware of the funding delays. Statewide, Community Corrections Partnerships must submit their AB 109 funding plans to their county board of supervisors for approval, but there is limited oversight afterward of how the funds actually are spent.

Providers also testified regarding the need for reality-based funding. There is general agreement that a lifetime of substance abuse problems and poor decision-making will not be resolved in a 30-day drug rehabilitation program. Providers estimate that a minimum of six months to a year of wraparound services are needed.<sup>61</sup> Ultimately, they point out, the state must decide if it wants to repeatedly incarcerate offenders or help them solve their underlying problems.

In addition to public safety realignment funding, the 2013-14 Budget Act included approximately \$206 million to strengthen local mental health

services. A primary goal of this funding is to increase access to intervention and treatment services to reduce recidivism.<sup>62</sup> As stated previously, Governor Brown has proposed providing an additional \$40 million for community-based programs and services from the Recidivism Reduction Fund. Implementation of the Affordable Care Act in California also will provide funding for mental health and substance abuse treatment, as California expanded Medi-Cal benefits to childless adults. Prior to release from prison to state or local supervision, offenders should be given resources to apply for Medi-Cal benefits, when appropriate, so that they are able to access services upon release.

The Commission has previously called for expanded oversight of realignment spending. At a minimum, counties should be required to annually provide an accounting of how realignment money was spent and make this information available on a county website and on the Board of State and Community Corrections website. Beginning in 2013-14, the state requires counties that accept a portion of nearly \$8 million that the state has been providing to county Community Corrections Partnerships to report to the Board of State and Community Corrections on the outcomes adopted in each county community corrections plan and progress in meeting those outcomes.<sup>63</sup> This information also should be made available on state and local websites.

State associations, including the Chief Probation Officers of California, the California State Association of Counties and the California State Sheriffs Association have made information on best practices available on their websites and at their conferences. The state should continue to encourage counties to expand proven practices that reduce recidivism. The state should hold counties accountable for adhering to best practices and proven programs and require counties to report outcomes for any additional state funding provided to counties from the new Recidivism Reduction Fund.

The Commission learned that many counties are using effective tools to assess flight risk, violence and re-offending. These tools could be used to move pre-trial detainees out of jail while awaiting trial and inform sentencing and post-release community supervision decisions. Despite the valuable potential of these tools, they currently are not used by all counties. Similarly, there is substantial data on reducing recidivism that is only being used partially, if at all. The Commission, in its May 2013 report on bail and pre-trial services, recommended that validated risk and needs assessments should be mandatory in each of California's 58 counties.

Legislation enacted by the Senate in January 2014, SB 210 (Hancock), adds criteria for a court to consider when setting bail and determining

eligibility for pretrial release. The legislation would require a court to consider a defendant's ties to the community, current participation in educational and vocational training and mental health or drug dependency issues as well as consideration of the nature and circumstances of the crime. It also would authorize a local government agency to conduct a pretrial investigation report including results from an evidence-based risk assessment tool.<sup>64</sup> As of February 2014, the legislation was under consideration by the Assembly.

Governor Brown has proposed that counties using risk and needs assessments be given priority for new funding for local facility expansion. The state should also give priority for Recidivism Reduction Fund money to counties that use risk and needs assessment tools.

### ***Public-Private Partnerships***

Throughout this study, Commission staff heard from officials who were worried that trying something new would make them seem soft on crime and hurt their chance of reelection. California does not have to invent new methods of treating offenders and could do more to incentivize counties to invest in programs proven to be effective in other places.

Effective re-entry programs are critical to both reducing the prison population and making realignment a success. Prison census data indicates that 96 percent of offenders incarcerated in state prison will re-enter their community.<sup>65</sup> The California Department of Corrections and Rehabilitation reports that 63.7 percent of individuals released from state prison recidivate within three years of their release.<sup>66</sup> As a result of public safety realignment many offenders released from prison and formerly supervised by state parole are now supervised by county probation departments.

Recidivism by offenders released from county jail is thought to be lower; the Los Angeles Police Department records it at 57 percent for Los Angeles County.<sup>67</sup> Reliable statewide data is unavailable, however, and there is a lack of agreement on a standard definition of recidivism. Public safety depends on strong re-entry services and one of the ways this can efficiently be accomplished is through public-private partnerships where public money is used to fund community-based organizations.

The Commission heard from several providers that not only shared their ideas, but shared with the Commission some of their financial information that highlighted how public-private partnerships could be beneficial to the state, the provider community and offenders. Amity

Foundation provides access to in-prison education and 9,000 in-prison treatment beds in California. It also has two post-release facilities, in Los Angeles and San Diego, which provide transitional housing, education, therapeutic and family reunification services to their clients. The National Institute on Drug Abuse funded two studies on outcomes for offenders who participated in the Amity in-prison program followed by aftercare in the community. Researchers found a substantial reduction in recidivism. Offenders who participated in in-prison drug treatment in therapeutic communities and completed an aftercare program in the community had a one-year return-to-custody rate of 8 percent, compared to a 39 percent recidivism rate for those who just completed in-prison treatment and a control group with a one-year return-to-custody rate of 50 percent. A follow-up study found that offenders participating in in-prison treatment followed by aftercare in the community had a five-year return-to-custody rate of 42 percent as compared to more than 80 percent for those completing only in-prison treatment or the control group. Also key is replicating the effective model. Researchers in a recent paper noted that outcomes may be different in the evaluated programs today as the California Department of Corrections and Rehabilitation, due to budget cuts during the recession, shortened the in-prison treatment program and reduced aftercare availability.<sup>68</sup>

### ***A Proven Practice for Young Adult Offenders***

Research has shown that young adult offenders, between 18 and 25, respond positively to the same treatments that have been effective with teenagers. Ridge View Youth Services Center, in Colorado, is a public-private partnership that provides education, discipline, treatment and other services to young offenders with the goal of successfully reintegrating them into their community. Currently, the majority of young adult offenders in California are housed in adult prisons.

Board of State and Community Corrections member and Anti-Recidivism Coalition Founder Scott Budnick suggested to Commission staff that California establish a pilot public-private partnership to provide the same sort of program as Ridge View for certain young adult offenders with sentences of 10 years or less. These young adult offenders would be removed from the general population and provided education and other programming to assist them in reintegrating into the community.

Commissioners and staff also met with officials from Homeboy Industries, which provides training and jobs plus myriad support services, including case management, education, life skills, trauma-informed clinical services, legal consultations and tattoo removal to formerly gang-involved and recently incarcerated individuals. It also delivers numerous services to at-risk individuals in the community

University of California, Los Angeles, researchers are studying participants in Homeboy Industries' 18-month job training and wraparound services program. They have found a four-year recidivism rate of 33 percent in their sample study.<sup>69</sup> The annual cost of the program per trainee is \$31,000, including the cost of the trainee's



wages.<sup>70</sup> By comparison, imprisoning an adult in a state facility costs \$60,032 per year and incarcerating a youth in a state facility costs \$202,133 per year.<sup>71</sup> Three-year recidivism rates for released felons are 63.7 percent for the adult population, 70.3 percent for males between 18 and 24 years of age and 53.8 percent for juveniles.<sup>72</sup>

### ***Leveraging Partnerships and Volunteers***

Public-private partnerships in criminal justice often utilize the expertise of qualified providers who are experienced with post-release offenders, use proven service delivery models and shed the risk of developing new models from the state or the county to the service providers. Competition allows state and local governments to contract with those who provide the best results and provides government an opportunity to leverage partnerships that the service providers have already created to maximize resources. Amity Foundation, for example, has developed partnerships that allow it to provide medical, dental, legal, job placement and housing services at approximately \$8,000 per year, per individual. Homeboy Industries is able to provide more than \$4,000 of volunteer services to each trainee through partnerships it has developed.

### ***Partnerships Beyond Funding***

The Commission heard from several providers who pointed out the need for public-private partnerships to encompass more than funding services. Susan Burton, founder of A New Way of Life residential programs for women, discussed with Commission staff the negative impact the early-morning residency checks by teams of Los Angeles Police Department officers had on her clients who were getting ready for work or job-searching. In a more recent conversation, Ms. Burton acknowledged improvements. At the September 2013 hearing, Amity Foundation's Mark Faucette echoed the concerns on residency checks and described police teams in SWAT gear entering the facility.<sup>73</sup> Another service provider remarked to Commission staff that the police could simply give them a phone call instead of expending so many resources and scaring neighbors of the facility. LAPD Chief Charlie Beck acknowledged that there are flaws in the relationship between police and post-release offenders, but stated that his officers have no information about the offenders and do not know the situation they are entering when they conduct a residence check or arrest an offender and that he has to protect his officers.<sup>74</sup>

### ***Summary***

In this review, the Commission was concerned about sentencing disparity, particularly the significant differences statewide in the use of the split sentence. At its September 2013 hearing, law enforcement leaders from Los Angeles expressed concern that so many offenders who formerly would have three years of parole supervision upon release from prison, were now released from jail with no supervision. Key to successful reintegration is not only local supervision but available programs and services that can help offenders successfully transition back into the community.

***Recommendation 3: The Governor and the Legislature should require all offenders sentenced under Penal Code 1170 (h) serving time in county jail to have mandatory supervision upon release from jail.***

***Recommendation 4: The state should incentivize counties to expand public-private partnerships with qualified organizations to provide services for offenders re-entering the community from jail or prison incarceration on mandatory post-release community supervision or on supervised probation.***

## Conclusion

California's correctional crisis has been one of the most vexing problems the Little Hoover Commission has ever reviewed. In the past two decades, the Commission has issued five reports and two letters all essentially finding a failed criminal justice system. The system fails to provide certainty in sentencing for victims, it fails to provide opportunities for offenders to turn their lives around and it fails to reduce recidivism as nearly two-thirds of all offenders released from prison return.

The answers to solving California's corrections crisis are well known, but politically difficult. Realignment was a first and important major step. Thousands of low-level offenders who would have gone to prison remain closer to home in hopes that community ties won't be severed and that local governments and their community-based partners will be more innovative and effective than the state in providing programs and services to stop the cycle of crime.

But realignment alone will not stop the trajectory of offenders filling up state prisons. Without additional reforms, the state will never reach the prison population reductions required by the federal courts. The federal courts in February 2014 granted California another reprieve in meeting the reduction target and gave California policymakers what they asked for – a two-year extension to reduce the prison population.

In return, policymakers have agreed to develop and implement durable reforms. The February 2014 court documents indicate California leaders will consider a commission to review the state's sentencing structure. California no longer has time to consider. It is time to act.

As a first step, California should send a strong signal that the purpose of prison is for more than just punishment. The Commission urges policymakers to amend the penal code to expand the purpose of incarceration beyond punishment and also include reduced recidivism and successful community reintegration.

The state then must align its sentencing with these expanded goals and its correctional resources. This can and has been done in other places while simultaneously reducing crime and improving public safety.

This Commission and others have repeatedly called for an independent sentencing commission. The Commission recognizes how politically difficult it is to establish a sentencing commission. At a minimum, the state should establish a Criminal Justice Policy Center, which would collect data on sentencing and best practices and provide recommendations on opportunities to improve sentencing and public safety. The information, data and guidance provided by the center could establish a path toward an independent sentencing commission.

In this review, the Commission also found opportunities to improve realignment, particularly by reducing significant disparities in local sentencing patterns. Some counties have shown that a split sentence, in which an offender serves a portion of the sentence in jail and a portion supervised in the community with access to proven programs and services, can reduce crime and improve correctional resource management. The Commission recommends the state require mandatory supervision for all offenders who prior to realignment would have gone to prison and but now serve time in jail.

Some counties have focused their portion of the \$1 billion that is provided annually for supervising realigned offenders on jail incarceration instead of a strategy of escalating appropriate alternative sanctions, emulating the failed policies that led to the state corrections system being overtaken by the federal courts.

The Commission urges the state to provide incentives to ensure that all counties use some realignment funding as well as any new funding provided through the Recidivism Reduction Fund to expand public-private partnerships to provide proven programs and services for offenders in the community.

It is long overdue for California to embrace the science and evidence that drives criminal justice sentencing in other states and countries before time runs out and the courts begin releasing offenders.

## ***Appendices & Notes***

✓ ***Public Hearing Witnesses***

✓ ***Notes***



# Appendix A

## Public Hearing Witnesses

The lists below reflect the titles and positions of witnesses at the time of the hearings in 2013.

***Public Hearing on Criminal Justice Sentencing  
June 25, 2013  
Sacramento, California***

Lenore Anderson, Director, Californians for  
Safety and Justice

Peggy McGarry, Director, Center on  
Sentencing and Corrections, Vera Institute of  
Justice

George Gascón, District Attorney, City and  
County of San Francisco

Robert Weisberg, Professor of Law and Faculty  
Co-Director, Stanford Criminal Justice Center

Dawn Koepke, Partner, McHugh, Koepke &  
Associates and Lobbyist, Crime Victims  
United

***Public Hearing on Criminal Justice Sentencing  
September 26, 2013  
Los Angeles, California***

Leroy D. Baca, Sheriff, County of Los Angeles

Lynne Lyman, California State Director, Drug  
Policy Alliance

Charlie Beck, Chief of Police, Los Angeles  
Police Department

Jerry Powers, Chief Probation Officer, Los  
Angeles County

Stan Galperson, Director of Residential &  
Outpatient Treatment, Tarzana Treatment  
Centers and Member, California Association of  
Alcohol and Drug Program Executives

Troy Vaughn, Chief Programs Officer, Lamp  
Community and Community Representative,  
Los Angeles County Public Safety Realignment  
Team

Mark Faucette, Vice President, Amity  
Foundation and Chair, Los Angeles Regional  
Reentry Partnership





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# Little Hoover Commission Members

**CHAIRMAN JONATHAN SHAPIRO** (*D-Beverly Hills*) Appointed to the Commission by the Senate Rules Committee in April 2010 and reappointed by the Senate Rules Committee in January 2014. Writer and producer for FX, HBO and Warner Brothers. Of counsel to Kirkland & Ellis. Former chief of staff to Lt. Governor Cruz Bustamante, counsel for the law firm of O'Melveny & Myers, federal prosecutor for the U.S. Department of Justice Criminal Division in Washington, D.C., and the Central District of California. Elected Chairman of the Commission in March 2013.

**VICE CHAIRMAN DAVID A. SCHWARZ** (*R-Beverly Hills*) Appointed to the Commission by Governor Arnold Schwarzenegger in October 2007 and reappointed by Governor Schwarzenegger in December 2010. Partner in the Los Angeles office of Irell & Manella LLP and a member of the firm's litigation workgroup. Former U.S. delegate to the United Nations Human Rights Commission.

**ASSEMBLYMEMBER KATCHO ACHADJIAN** (*R-San Luis Obispo*) Appointed to the Commission by Speaker of the Assembly John Pérez in July 2011. Elected in November 2010 to the 33rd Assembly District and re-elected to the 35th District in November 2012. Represents Arroyo Grande, Atascadero, Grover Beach, Guadalupe, Lompoc, Morrow Bay, Paso Robles, Pismo Beach, San Luis Obispo, Santa Maria and surrounding areas.

**SENATOR ANTHONY CANNELLA** (*R-Ceres*) Appointed to the Commission by the Senate Rules Committee in January 2014. Elected in November 2010 to the 12th Senate District. Represents Stanislaus, Merced, Madera and San Benito counties and a portion of Monterey County.

**JACK FLANIGAN** (*R-Granite Bay*) Appointed to the Commission by Governor Edmund G. Brown Jr. in April 2012. A member of the Flanigan Law Firm. Co-founded California Strategies, a public affairs consulting firm, in 1997.

**LOREN KAYE** (*R-Sacramento*) Appointed to the Commission by Governor Arnold Schwarzenegger in March 2006 and reappointed by Governor Schwarzenegger in December 2010. President of the California Foundation for Commerce and Education. Former partner at KP Public Affairs. Served in senior policy positions for Governors Pete Wilson and George Deukmejian, including cabinet secretary to the governor and undersecretary for the California Trade and Commerce Agency.

**PEDRO NAVA** (*D-Santa Barbara*) Appointed to the Commission by Speaker of the Assembly John Pérez in April 2013. Advisor to telecommunications industry on environmental and regulatory issues and to nonprofit organizations. Appointed in 2011 to the California Department of Fish & Game Blue Ribbon Commission to assist in the development of the Wildlife Strategic Vision. Former state Assemblymember. Former civil litigator, deputy district attorney and member of the state Coastal Commission.

**ASSEMBLYMEMBER ANTHONY RENDON** (*D-Lynwood*) Appointed to the Commission by Speaker of the Assembly John Pérez in February 2013. Elected in November 2012 to represent the 63rd Assembly District. Represents Bell, Cudahy, Hawaiian Gardens, Lakewood, Lynwood, Maywood, Paramount and South Gate and the North Long Beach community.

**SENATOR RICHARD ROTH** (*D-Riverside*) Appointed to the Commission by the Senate Rules Committee in February 2013. Elected in November 2012 to the 31st Senate District, representing Corona, Coronita, Eastvale, El Cerrito, Highgrove, Home Gardens, Jurupa Valley, March Air Reserve Base, Mead Valley, Moreno Valley, Norco, Perris and Riverside.

**SUMI SOUSA** (*D-San Francisco*) Appointed to the Commission by Speaker of the Assembly John Pérez in April 2013. Officer of policy development for San Francisco Health Plan. Former advisor to Speaker Pérez. Former executive director of the California Health Facilities Financing Authority, special assistant to San Francisco Mayor Willie Brown, Jr., and member of the California Children and Families Commission, the California Health Facilities Financing Authority and the Asian Pacific Youth Leadership Project.

Full biographies available on the Commission's website at [www.lhc.ca.gov](http://www.lhc.ca.gov).

“Democracy itself is a process of change, and satisfaction and complacency are enemies of good government.”

*Governor Edmund G. “Pat” Brown,  
addressing the inaugural meeting of the Little Hoover Commission,  
April 24, 1962, Sacramento, California*